

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1545

Cir. Ct. No. 2008CV1654

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SWIDERSKI EQUIPMENT, INC. AND ALEX K. SWIDERSKI,

PLAINTIFFS-RESPONDENTS,

V.

JAMES J. SWIDERSKI,

DEFENDANT-APPELLANT,

SANDRA L. SWIDERSKI AND APPLETON INVESTMENT, LLC,

DEFENDANTS.

APPEAL from an order of the circuit court for Outagamie County:
MARK J. McGINNIS, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. James Swiderski appeals an order compelling him to accept Swiderski Equipment, Inc.'s tender to redeem his shares of the

corporation at a certain price. James argues the circuit court misinterpreted the share-valuation provisions of the parties' corporate redemption agreement. We agree, and reverse.

BACKGROUND

¶2 Alex Swiderski is the majority shareholder, president, and sole director of Swiderski Equipment (collectively, Swiderski Equipment). His son, James, became the only minority shareholder of Swiderski Equipment in December 1986. At that time, Alex and James signed a corporate redemption agreement (CRA). The CRA placed share restrictions and obligations on Swiderski Equipment's shareholders and granted the corporation share-redemption rights. As relevant here, the CRA provided: "In the event a Shareholder ceases to be employed by the Corporation for any reason, the Corporation shall have the option to purchase the shares held by the Shareholder at the price indicated in paragraph 8" Under paragraph 8, the shares were valued at \$1000 each unless and until they were later revalued pursuant to specific terms. James ceased employment with Swiderski Equipment in 2008.

¶3 In August 2008, Swiderski Equipment notified James and his then-wife, Sandra Swiderski, that the corporation was exercising its option to redeem their 510 shares. James and Sandra were involved in a contentious divorce at the time, and Sandra initially objected to the redemption. Swiderski Equipment sued to enforce the CRA in September.

¶4 In July 2009, Sandra moved to compel Swiderski Equipment to purchase her and James's shares for \$1000 each. In response, Swiderski Equipment moved for partial summary judgment declaring it maintained the right, but had no obligation, to redeem James's shares pursuant to the CRA. Swiderski

Equipment explained it no longer wished to redeem the stock “given the drastic downturn in the economy.” In February 2010, the court granted Swiderski Equipment’s motion and denied Sandra’s, declaring James and Sandra “are bound by the [CRA]” and the corporation “has the right, but not the obligation, to redeem the stock owned by” James and Sandra.

¶5 James, Sandra, and Swiderski Equipment subsequently entered into a stipulation for entry of judgment, and the court entered a final judgment in July 2010. The stipulation, with the proposed judgment attached, provided: “In consideration of the entry of the Judgment ... all parties waive their right to appeal the Judgment, in whole or in part, and the Orders on which the Judgment is based.” The final judgment then repeated the declarations set forth in the summary judgment order.

¶6 In November 2010, James requested a share revaluation pursuant to paragraph 8 of the CRA.¹ Swiderski Equipment refused, responding that the final judgment had locked the share price at \$1000. In December 2012, James again requested a share revaluation. Swiderski Equipment did not respond.

¶7 However, soon thereafter, in January 2013, Swiderski Equipment notified James it was exercising its option to redeem his shares, and tendered a check for \$510,000 for the 510 shares. James acknowledged the corporation’s right to purchase the shares, but disputed the share value. Swiderski Equipment

¹ Originally, some of the shares were in James’s name and some were in Sandra’s. However, the parties treat the shares as all belonging to James following the July 2010 final judgment. We therefore do the same.

moved for contempt and sanctions, or, alternatively, for an order compelling James to return his stock certificates or for a declaration of forfeiture.

¶8 At the hearing on Swiderski Equipment’s motion, the circuit court found: “[T]he final judgment filed [in July] 2010, is silent as it relates to what the price of the stock ... would be if Swiderski Equipment ... exercised [its] right to redeem the stocks owned by James ... pursuant to ... that final judgment.” Further, the court found, “[I]t appears that there was no discussion or no agreement that went into that final judgment as it relates to what the value of the stock would be if, in fact, it was redeemed.” The court therefore proceeded to interpret and apply paragraph 8 of the CRA, ultimately determining the stock should be priced at the original \$1000 value. Following the hearing, the court entered an order compelling James to deliver the stock certificates to Swiderski Equipment in exchange for the tendered payment. James now appeals.

DISCUSSION

¶9 James argues the circuit court misinterpreted paragraph 8 of the CRA. Swiderski Equipment responds that the court correctly interpreted the CRA, but primarily argues that we should not reach the issue because James waived his right to appeal. We first address the threshold issue of whether James may appeal.

¶10 Swiderski Equipment argues James waived his right to appeal the order requiring him to accept the tendered payment. Swiderski Equipment asserts the order “directly relates back to and is based on and controlled by” the stipulation for entry of judgment and final judgment entered in July 2010. It contends this appeal is consequently barred by James’s waiver of appellate rights set forth in the stipulation and final judgment. However, Swiderski Equipment’s

argument relies entirely on its assertion that the final judgment granted it the right to redeem the shares at \$1000 each.

¶11 Swiderski Equipment’s waiver argument fails because, as set forth above, the circuit court expressly found the parties had not contemplated, and the final judgment did not address, the share price. Because Swiderski Equipment does not assert, much less develop an argument, that the court’s determinations were erroneous, it is bound by those findings. Nonetheless, Swiderski Equipment simply ignores the facts and repeatedly asserts it was clear to the parties that they were stipulating to a fixed \$1000 share price. For example, it asserts:

There can be absolutely no misunderstanding ... as to what rights Swiderski Equipment was seeking to enforce at the time the [stipulation] and [final judgment] were ... entered.

....

At the time the Stipulation was signed, James knew he was waiving the right to appeal ...[,] which gave Swiderski the right to redeem his shares at \$1,000.00 per share.

....

The Stipulation ... and Final Judgment do[] not recite the price. However, at the time, everyone knew that the price was locked at \$1,000.00 per share.

....

[T]he procedural and temporal context within which the Stipulation ... and Final Judgment took place clearly establishes that the parties knew exactly what their Stipulation meant in terms of their respective rights and the purchase price ... to redeem James’[s] stock

By ignoring the circuit court’s findings and asserting facts to the contrary, Swiderski Equipment fails to develop a comprehensible legal argument. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (undeveloped arguments are rejected).

¶12 In any event, the July 2010 stipulation and final judgment are clear and unambiguous. They state that James is bound by the CRA and that Swiderski Equipment would retain its right, but had no obligation, to redeem James's shares. They further indicate James waived his right to appeal the final judgment. The issues settled by the judgment, however, are not implicated in the present dispute. Indeed, James conceded those two issues from the outset. James's appeal waiver is therefore inapplicable to the present dispute regarding interpretation of the CRA's paragraph 8.

¶13 We therefore turn our attention to paragraph 8, which provides:

Price. The price of each share of stock under this agreement shall be determined as follows:

SET PRICE SUBJECT TO REDETERMINATION

The price of each share of stock of the Corporation to be purchased and sold under this agreement shall be fixed by the Shareholders and the Corporation, as evidenced by a certificate setting forth such fixed price, which certificate shall be dated and executed by the Shareholders and the Corporation's officers and attached hereto. The fixed price set forth in the certificate attached hereto shall be binding on the parties for all purposes of this agreement, except that during the ninety (90) day periods following the last day of the Corporation's fiscal year ending within the calendar years 1988, 1990 and within each subsequent second year thereafter, any party may request that a study be undertaken to arrive at a new fixed price to be agreed upon by the parties. No such request shall alter the then effective fixed price prior to the execution of a new fixed price certificate. The new fixed price shall take effect as of the date of execution of the certificate, and shall be binding on the parties for all purposes, subject to the limitations of this paragraph. If, during the appropriate ninety (90) day period, no party makes a request for a study to be undertaken to arrive at a new fixed price to be agreed upon by the parties, the fixed price set forth in the latest executed certificate attached hereto shall remain in effect for the subsequent two (2) year period. If any party shall, within the appropriate ninety (90) day period, request that a study be undertaken to arrive at a new fixed price to be agreed

upon by the parties, and if the parties shall be unable to agree upon such a fixed price within forty-five (45) days following the request, then Krause, Howard & Company shall appraise the Corporation and determine its value. The fees and costs of the appraisal shall be borne equally by the parties.

When the CRA was entered into in 1986, the initial set price was \$1000. The value has not been redetermined since.

¶14 James argues he is entitled to a redetermination of the share price because he twice requested a valuation prior to Swiderski Equipment's January 2013 notice that it was redeeming James's shares. Swiderski Equipment does not dispute that James's requests complied with paragraph 8. Rather, the corporation argues the circuit court correctly interpreted the provision and determined the share price should not be revised.

¶15 Contract interpretation presents a question of law subject to de novo review. *Osborn v. Dennison*, 2009 WI 72, ¶33, 318 Wis. 2d 716, 768 N.W.2d 20. Contract interpretation generally seeks to give effect to the parties' intentions. *Tufail v. Midwest Hospitality, LLC*, 2013 WI 62, ¶25, 348 Wis. 2d 631, 833 N.W.2d 586. However, "subjective intent is not the be-all and end-all." *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. Rather, "unambiguous contract language controls contract interpretation." *Id.* "We presume the parties' intent is evidenced by the words they chose, if those words are unambiguous." *Id.* Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms. *Tufail*, 348 Wis. 2d 631, ¶26.

¶16 The crux of the parties' dispute is whether, if the parties cannot agree to a new fixed price within forty-five days of a revaluation request, the

accounting firm's appraisal value must be accepted, or is merely advisory. The circuit court determined the appraisal was merely advisory and the parties still had to agree to a new price and execute a new certificate before any new valuation would be binding.

¶17 We disagree with the circuit court's interpretation. Paragraph 8 clearly and unambiguously provides that if the parties cannot timely agree to a new value, then the value will be finally determined by the third-party accounting firm. It states: "[I]f the parties shall be unable to agree upon such a fixed price ... then Krause, Howard & Company shall appraise the Corporation and determine its value." Interpreting paragraph 8 to require the parties to subsequently agree to a share value would be illogical. The third-party appraisal is only required if, in the first instance, the parties failed to agree on a price following a "study" intended to produce such agreement. Additionally, once a corporation's value is known, the share value is known as well.²

¶18 Moreover, requiring the parties to mutually agree to a price under all circumstances would effectively read the last two sentences of paragraph 8 out of the contract. We "must avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage." *Goebel v. First Fed. S&L Ass'n of Racine*, 83 Wis. 2d 668, 680, 266 N.W.2d 352 (1978). While the contract does not define or explain the term "study," the term is certainly broad enough that the parties could seek outside accounting assistance, including an appraisal, in their

² The parties have identified no dispute concerning the total number of existing shares of the corporation.

initial attempt to agree on a price. Thus, there would be no need to separately mandate an appraisal that is then nonbinding.

¶19 Swiderski Equipment nonetheless relies on the following language in paragraph 8 to argue the fixed price can never be altered except upon agreement by both parties:

[A]ny party may request that a study be undertaken to arrive at a new fixed price to be agreed upon by the parties. No such request shall alter the then effective fixed price prior to the execution of a new fixed price certificate. The new fixed price shall take effect as of the date of execution of the certificate, and shall be binding on the parties for all purposes, subject to the limitations of this paragraph.

There are two problems with the corporation's reliance on this language. First, it only states that a mere request for the preliminary study cannot alter the fixed price; it does not state that a subsequent appraisal cannot do so. Further, the provision that the new price only takes effect upon execution by agreement of a new certificate is expressly subject to other "limitations of th[e] paragraph."

¶20 We conclude the only reasonable interpretation of paragraph 8 is that the parties are bound by an appraisal obtained pursuant to the terms of the paragraph. A contrary interpretation would impermissibly permit one party to unreasonably and indefinitely thwart a revaluation. Accordingly, we reverse and remand for the parties to obtain a price redetermination consistent with our interpretation of paragraph 8.³

³ James alternatively argues the circuit court's interpretation of paragraph 8 of the CRA leads to an unconscionable result. Given our interpretation of paragraph 8, we need not address this argument. See *State v. Castillo*, 213 Wis.2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

